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IN THE

Supreme Court of the United States

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OCTOBER TERM, 1944.

No. 824

PATHFINDER PETROLEUM COMPANY, a corporation,  
*Petitioner,*

*vs.*

GENERAL INSURANCE COMPANY OF AMERICA, a corpora-  
tion,

*Respondent.*

Petition for Writ of Certiorari to the United States  
Circuit Court of Appeals for the Ninth Circuit  
and Brief in Support Thereof.

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*To the Honorable Harlan F. Stone, Chief Justice of the  
United States, and to the Associate Justices of the  
Supreme Court of the United States:*

Your petitioner respectfully shows:

**Summary Statement of Matter Involved.**

This is an action at law brought in the District Court of the United States, Southern District of California, Central Division, by Pathfinder Petroleum Company, petitioner herein, against General Insurance Company of America, respondent herein, to recover \$37,672.21 by way of loss of profits under a use and occupancy policy issued by respondent on petitioner's oil refinery, which was damaged by fire.

### Concise Statement of the Case.

In January 1940 petitioner opened an oil refinery for the manufacture and distribution of petroleum products. It obtained from respondent a use and occupancy policy insuring against loss of profits and fixed charges and expenses resulting from the suspension of the use and occupancy of the manufacturing plant.

The policy insured against:

“Actual Loss Sustained, by reason of such suspension, consisting of:

“Item I. The net profits on the business which is thereby prevented:

“Item II. Fixed charges and expenses only to the extent to which they would have been earned had no fire occurred, as follows: Salaries of indispensable employees, . . . all other fixed charges and expenses . . .” [R. 13-14.]

On August 31, 1940 a fire partially destroyed petitioner's plant and caused a suspension of operations for ninety days. Petitioner filed a preliminary proof of loss [R. 115] and supplement thereto [R. 117] and, after objections to alleged defects therein [R. 120], filed a 42-page document meeting these objections. [R. 65-113.] The loss claimed under Item I was \$22,974.94, under Item II \$14,697.27.

Under the policy the insurer was required to advise the insured of “the amount of loss, if any, the company admits on each of the different articles or properties set forth.” [R. 34.] The proof of loss was, however, rejected by the insurer's peremptory statement [R. 114]:

“The amount of loss which this company admits on each or all of the items specified in said preliminary proof of loss is nothing.

"You are further notified that the undersigned does not admit that you suffered any loss on each or any of the different articles or on each or any of the different properties set forth in said preliminary proof of loss."

Suit followed, and after issue had been joined on the questions hereinafter stated and others not available as grounds for this petition, the insurer admitted in the course of the trial that the loss sustained by petitioner under Item II of the policy *under one theory* was \$5,801.25 and *under another theory* was \$6,198.20. [R. 358.]

The trial court found that the net profit on the business prevented during suspension under Item I amounted to \$22,974.94, and on Item II to be the sum of \$7,348.63, this being one-half of the amount stated in the proof of loss.

The appeal by the insurer and a cross-appeal by petitioner resulted in a reversal on Item I, but in an affirmance on Item II of the policy.

The questions on appeal were: *First*, by what method petitioner's loss of profits should be computed; *Second*, whether, under the law of California, petitioner's proof of loss, fixed and determined the *amount of loss* sustained by petitioner where respondent failed to comply with the provisions of the policy with respect to making specific objections to the proof of loss and in failing to request an appraisal; *Third*, to what extent depreciation should be considered in arriving at petitioner's loss. The latter question resulted in disagreement of the Appellate Court, Mr. Justice Stevens being of the opinion that the trial court's determination of the issue of depreciation was supported by the evidence.

### Jurisdictional Statement.

It is contended that the Supreme Court has jurisdiction to review the judgment under section 240a of the Judicial Code of the United States (28 U. S. C. A., par. 347a).

The jurisdiction of the United States District Court rested on the diversity of citizenship of the parties and on the fact that the amount in controversy was in excess of \$3,000 (28 U. S. C. A., Section 41).

The Circuit Court of Appeals had jurisdiction to review the judgment rendered by said District Court under 28 U. S. C. A., Section 225.

The opinion of the Circuit Court of Appeals [R. 395] was filed August 29, 1944. A timely petition for rehearing followed, which was denied on October 30, 1944. The grounds modifying and denying this petition are stated in a short opinion. [R. 413.]

### Questions Presented.

1. Is an insurer precluded under California law from disputing the *amount* of (as distinguished from the liability for) a use and occupancy loss set forth in a detailed, verified proof of loss, if its policy requires that the insured be notified of the insurer's

"partial or total disagreement with the amount of the loss claimed . . . and . . . also . . . of the amount of loss if any the company admits on each of the different articles or properties set forth,"



where the insurer, although later admitting that under one theory of its policy the insured is entitled to \$5,801.25 and under another theory to \$6,198.20, merely advises the assured that

“the amount of loss which this company admits on each or all of the items specified in said preliminary proof of loss is nothing.”

2. How under the law of California, is the actual loss of net profits prevented by a fire to be calculated; and, whatever the method, is the court entitled to single out for consideration the production costs and sales prices for the last three months before the fire where the policy provides that

“due consideration shall be given to the experience before the fire and the probable experience thereafter.”

3. Where the policy of insurance is silent on the manner in which depreciation should be treated in the event of a loss, may the Circuit Court of Appeals arbitrarily interfere with the amount of depreciation found by the trial court, at the same time refusing to allow depreciation to the insured as an item of fixed charges when the parties, in conformity with undisputed accounting practice, agree that depreciation is a proper fixed charge.

### Reasons Relied on for Allowance of the Writ.

The writ prayed for should be allowed for the following reasons:

1. The Circuit Court of Appeals, in holding that the insurer, by denying all liability under a proof of loss without specifying the items of loss with which it disagrees in whole or in part, does not thereby preclude itself from litigating the *amount* of the loss (as distinguished from its liability under the policy), decided an important local question in conflict with applicable local law. The statutes and decisions which should have been applied are

*California Insurance Code*, Sec. 2071;

*Lauman v. Concordia Fire Ins. Co. of Milwaukee, Wisconsin*, 50 Cal. App. 609, 195 P. 941;

*Victoria Park Co. v. Continental Ins. Co. of New York*, 39 Cal. App. 347, 178 P. 724.

2. The Circuit Court of Appeals interpreted the provisions of Item I of the policy contrary to the canon of interpretation that obtains in the State of California with respect to insurance policies.

*Civil Code*, 1654;

*Blackburn v. Home Life Ins. Co.*, 19 Cal. (2d) 226, 120 P. (2d) 31;

*Natl. Automobile Ins. Co. v. Ind. Acc. Comm.*, 11 Cal. (2d) 506, 75 P. (2d) 644.

Wherefore, your petitioner prays that a writ of certiorari issue under the seal of this court directed to the

Circuit Court of Appeals, for the Ninth Circuit commanding said court to certify and send to this court a full and complete transcript of the record and of the proceeding of said Circuit Court of Appeals had in the case numbered and entitled on its docket, No. 10494, General Insurance Company of America, a corporation, Appellant, vs. Pathfinder Petroleum Company, a corporation, Appellee, and Pathfinder Petroleum Company, a corporation, Appellant, vs. General Insurance Company of America, a corporation, Appellee, to the end that this cause may be reviewed and determined by this court as provided for by the statutes of the United States, and that the judgment herein of said Circuit Court of Appeals be reversed; and for such further relief as to this court may seem proper.

Dated: December 15, 1944.

EARL GLEN WHITEHEAD,  
*Counsel for Petitioner.*

State of California, County of Los Angeles—ss:

Earl Glenn Whitehead, being first duly sworn, deposes and says, that he is the attorney for the petitioner named in the foregoing Petition for Writ of Certiorari; that he has read the foregoing Petition for Writ of Certiorari and knows the contents thereof; and that the same is true of his own knowledge except as to the matters which are therein stated upon his information or belief, and as to those matters, that he believes them to be true.

EARL GLENN WHITEHEAD.

Subscribed and sworn to before me this 15th day of December, 1944.

RALPH J. BROWN,  
*Notary Public in and for the County of Los Angeles,  
State of California.*

My commission expires April 12, 1947.

